

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1902 OF 2005

1. Reliance Energy Limited,  
a Company incorporated under  
the provisions of Indian Companies  
Act, 1913 having its registered  
Office at Reliance Energy Centre,  
Santacruz (East), Mumbai 400 055.

2. Mr. Ramesh Shenoy, Company  
Secretary and Shareholder of  
Petitioner No.1 having his office  
at Reliance Energy Centre,  
Santa Cruz (East), Mumbai 400 055.... Petitioners

Vs.

1. Chief Engineer (Electrical),  
PWD Department,  
Government of Maharashtra,  
being the Appellate Authority  
Under Section 127 of the Electricity  
Act, 2003 having his office at  
Administrative Building, 3rd Floor,  
Ramkrishna Chemburkar Marg,  
Chembur East, Mumbai 400071.

2. Shankarlal Bansal of Mumbai  
Indian Inhabitant residing at  
Plot No. 134, Road No. 9, Daulat  
Nagar, Borivali East,  
Mumbai 400 066.

.... Respondents

Mr. J.J. Bhat, Sr. Counsel with Mrs. Anjali  
Chandurkar i/by Mulla & Mulla & C.B. & Craige for  
Petitioner.

Mr. R.M. Sawant, Government Pleader for R. No. 1.

Mr. V.P. Vaze for R. No. 2.

**CORAM: F.I. REBELLO &  
MRS.V.K.TAHILRAMANI, JJ.**

**DATE : 27TH JULY, 2006**

ORAL JUDGMENT (Per F.I. Rebello, J.) :

1. The first Petitioner is a company incorporated  
under the provisions of the Indian Companies Act,

1930 which carries on business inter alia of generation and distribution of electricity. Petitioner No. 2 is a shareholder of the company. Respondent No. 1 is the appellate authority appointed under Section 127 of the Electricity Act, 2003 (hereinafter referred to as "Act"). The Respondent No. 2 is an original consumer of the first Petitioner having a two storied bungalow. The Petitioner by the present Petition challenges the legality and validity of the order dated 18.3.2005 which hereinafter shall be referred to as the impugned order passed by the Respondent No. 1 under the provisions of Section 127 of the Act. By the impugned order the first respondent directed that the assessment charged for the unauthorised use of the electricity by Respondent No. 2 shall be limited for a period of three months immediately proceeding the date of detection of the illegality. That order is the subject matter of the present petition.

2. There were several other petitions including Writ Petition No. 2156 of 2006, Writ Petition No. 2157 of 2006, Writ Petition No. 2158 of 2006 and Writ Petition No. 2159 of 2006, wherein also one of the challenges was to limiting the recovery of electricity dues as is the present challenge. There was also another challenge before the appellate

authority in those proceedings. The Respondent No. 2 in those proceedings held that the order of assessment was not passed by the Assessing Officer. Ordinarily this issue had to be decided in those petitions. As in those petitions none appeared for the private respondents and were exparte and as Respondent No. 2, the present Respondent is represented in this petition, we thought it appropriate to decide that controversy also in the present petition, after hearing counsel for the Respondent No. 2 as well as counsel holding for Respondent No. 1.

3. The two issues therefore, which will be decided in this petition are :- (1) Whether Section 127 of the Electricity Act, limits the power of the Assessing Officer to recover charges, for unauthorised use of electricity, for the period of three months or six months as the case may be preceding the inspection and detection of the unauthorised use. (2) Whether on the inspection done by the person other than assessing Officer considering the language of Section 126, is it open to the Assessing Officer to rely on that inspection record for the purpose of making a provisional assessment and thereafter, passing an order of assessment under Section 126(5) of the Act.

4. We may gainfully refer to the provisions of Section 126 of the Electricity Act, 2003 which reads as under :

"126. (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom a notice has been served under sub section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who may, after affording

a reasonable opportunity of hearing to such person, pass a final order of assessment of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the license within seven days of service of such provisional assessment order upon him.

Provided that in case the person deposits the assessed amount, he shall not be subjected to any further liability or any action by any authority whatsoever.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, it shall be presumed that such unauthorised use of electricity was continuing for a period of three months immediately preceding the date of inspection in case of domestic and agricultural services and for a period of six months immediately preceding the date of inspection for all other categories of services, unless the onus is rebutted by the

person, occupier or possessor of such premises or place.

(6) The assessment under this section shall be made at a rate equal to one and half times the tariff applicable for the relevant category of services specified in subsection (5).

Explanation : For the purposes of this section :

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity -

(i) by any artificial means; or (ii) by a means not authorised by the concerned person or authority or licensee; or (iii) through a tampered meter; or (iv) for the purpose other than for which the usage of electricity was authorised."

. The next provision which we may refer to is Section 135(2) which reads as under :

"135. Theft of electricity : (1) whoever, dishonestly, - .....

(2) Any officer authorised in this behalf by the State Government may - (a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being used unauthorizedly; (b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being used for unauthorised use of electricity. (c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence..."

. We may now refer to Section 56.

"56. Disconnection of supply in default of

payment : (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer;

Provided that the supply of electricity shall not be cut off if such person deposits, under protest, -

(a) an amount equal to the sum claimed from

him, or (b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two year from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrears of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

(Emphasis supplied)

5. We shall first deal with the issue as to whether there is limitation on the powers of the Assessing officer to restrict the claim of the company only for a period of three months immediately preceding the date of investigation in case of domestic and agricultural services and for the period of six months immediately preceding the date of investigation for all other categories of services.

. On behalf of the Petitioners, it is submitted that a perusal of Section 126(5) of the Act would make it clear, that the limitation set out therein of three months or six months only raises a presumption that there was unauthorised use of electricity for that period. The section enables the assessee to rebut that presumption. It is no bar on the rights of the company to make recovery of legal dues as per law. It will therefore, be still open to the Company to make recovery beyond the period of three months and or six months respectively to the extent the company is entitled to claim within the meaning of the schedule to the Limitation Act, 1963. It is submitted that any other view taken would result even if the company is in a position to establish that there was unauthorised use for a longer period, being denied the right to make recovery. This must be seen in the context of section 145 of the Act which ousts the jurisdiction of the Civil Court to the extent referred therein:

"145. Civil Court not to have jurisdiction  
: No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate

authority referred to in section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

. On the other hand on behalf of the contesting Respondents No. 2, it is submitted that the view taken by the Respondent No. 1 is a view capable of being taken in law and as such the order cannot be faulted.

. Shri. Sawant appearing for State Government concedes that it is not possible to support the order of Respondent No. 1 restricting the right of the company and that section 126(5) of the Act, merely creates a presumption.

6. Ordinarily, the provisions of the Limitation Act, 1963 would apply to all proceedings before a court and or before tribunal when made applicable. The only exception being section 29 of the Limitation Act. Section 29(2) of the Limitation Act, reads as under :

"29. Savings : (1) .....  
 (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in section 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law. "

. The interpretation of Section 29(2) has been the subject matter of various judgments. We may however, gainfully refer to the judgment in Union of India Vs. Popular Construction Co. (2001) 8 Supreme Court Cases 470. That was the case under Section 34 of the Arbitration & Conciliation Act, 1996. The Apex Court held that the provisions of Section will apply when :

(i) there is a special or local law which prescribes a different period of limitation

for any suit, appeal or application; and

(ii) the special or local law does not expressly exclude those sections."

. In that case it was held that Section 34 of the Limitation Act was a special law which provides for period of limitation different than the prescribed under the Limitation Act. The court held as under :

"If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

. In other words, the Apex Court came to the conclusion that Section 34 provided for special limitation other than provided under the Limitation Act, 1963 and the provisions of Section 5 of the Limitation Act which extends period of limitation in certain cases would not be applicable.

. In the instant case, all that Section 126(5) sets out is that the Assessing Officer if he reaches the conclusion that there is unauthorised use of

electricity, then considering the presumption can hold that there is assessment of such unauthorised use of electricity which was continuing for a period of three months or six months, immediately preceding the date of inspection as set out earlier. This presumption of three months or six months can be rebutted by the person, occupier or possessor of such premises or place. This would indicate that the section does not prohibit the recovery for the period under which company could have normally recovered its dues in terms of the schedule to the Limitation Act. The embargo is limited to the extent of raising presumption which also is rebuttable presumption for the period of three months or six months respectively. Section 126(5) is therefore, not a special provision provided for limitation independent of the provisions of the Limitation Act. Unlike Arbitration and Conciliation Act, 1996, there is no special limitation provided and that being the case, it will be difficult to hold that the person like the company in the instant case, who is petitioner herein is barred from making recovery for the period which in normal law would be the period for recovery of money. This is further fortified by the language of Section 56 of the Act. Section 56(1) makes it clear that the generating company can exercise the right, without prejudice to its right to file a suit. In other words, the Act

does not bar the jurisdiction of the civil court to entertain a suit for recovery of legal dues. In such a case, it will be the Limitation Act which will apply in so far as recovery of dues re concerned. If Section 56 is now seen in the context of Section 126, all that happens under Section 126, is that, if the Assessing Officer comes to the conclusion that there is unauthorised use of electricity, then there is a presumption that such unauthorised use is for a period of three months and six months respectively as the case may be, if not rebutted by the assessee. The consequence of such assessment are, for that period, in terms of section 126(6), the assessment is at a rate equal to one and a half times the applicable tariff. The remedy of the company to make recovery for additional periods for unauthorised use is not limited. A careful reading of Section 145, will show that the ouster of jurisdiction is in respect of detection of unauthorised use. Neither Section 126 or Section 127, ousts the jurisdiction of the Civil court for entertaining a suit at the instance of a generating company for any other period, which in law is recoverable and not barred by the law of limitation as is clear from a reading of Section 56(1) of the Act. The power of the Assessing Officer is, therefore, limited to detection of unauthorised use and to pass an order of recovery which limits the

period to three months or six months as the case may and make assessment in terms of Section 126(6) for that period. Where the Act has provided for a special limitation, it has so provided, for example, Section 111(2) and Section 127 of the Act.

.In our opinion, such a construction, would be proper, considering that the lakhs of consumers which the company may be serving. To limit the right of the company to make recovery for a limited period of three months or six months as the case may be in the absence of an express bar of recovery for a period beyond three months or six months, would defeat the object of the Act and the rights of the generating company.

. A learned Judge of the Andhra Pradesh High Court in the case of B. Laxmi Vs. Assistant Divisional Engineer (OP), Northern Power Distribution Co. of A.P. Ltd. and Anr. 2004(1) ALD 546 was considering a similar issue. The learned Judge observed that in assessing the value of the energy provisionally as seen from sub section (1) of Section 126, the Assessing Officer has to do his assessment to the best of his judgment. The power of the Assessing Officer is not controlled or circumscribed by Sub Section (5). Sub section (5)

of Section 126 as read above, takes care of an altogether different situation. It contains a deeming provision, a presumption. If the assessing officer has no proper material or pilferage of energy is of such nature that the assessing officer cannot reasonably fix the period during which there has been unauthorised use of electricity, in such cases, he can presume that there has been continuous unauthorised use of energy for a period of six months or three months as the case may be. The presumption contained in sub section (5) does not in any manner prevent or prohibit the Assessing officer while provisionally assessing the electricity charges payable by such person under Sub section (1) of Section 126 of determining actual energy pilfered.

. We are in agreement with that part of the judgment which deals with detection of pilferage and consequent presumption. But we are unable to agree with the view that the Assessing Officer can pass an order for more than three months or six months. If the power was not limited to three months or six months, there was no question of permitting the person, occupier or possessor to rebut the presumption only for three months or six months. Such rebuttal thus ought to have been for the entire period for which the Assessing Officer can arrive at

a conclusion that there was unauthorised use. Further the Assessment under Section 126(6) has to be made at a rate equal to one and a half times the tariff applicable to the relevant category of services specified in subs section (5) for that period. We are also of the opinion that though there is a bar in the Assessing Officer exercising his jurisdiction in submitting provisional bill for the period of more than three or six months as the case may be, there is no bar in the Civil Court entertaining a suit as set out earlier. The first issue is answered accordingly.

7. We then come to the second issue as to whether it is only the assessing officer as set out in Section 126, who alone can inspect the premises and that the provisional assessment can only be made based on the investigation done by the Assessing Officer. It is no doubt true that Section 126 on the first blush, if literally read means that inspection must be done by the Assessing Officer. The Assessing Officer in the explanation to Section 126, means the officer of the State Government or Board or licensee, as the case may be, designated as such by the State Government. If we take this view, then it is only those officers as designated by the State Government who alone based on their personal inspection can make an order of provisional

assessment. The other view which is possible is that the Assessing Officer himself need not do the inspection, but that inspection can be carried out by any other authorised person under the Act. If the Assessing Officer, however, seeks to rely on the inspection report prepared by such other authorised person, than the Assessing officer, though can make a provisional assessment, will have to direct the company to support the provisional assessment by evidence that there has been unauthorised use of electricity for the presumption to be created under Section 126(5). The person other than Assessing officer who carries out the inspection, apart from the report prepared by such person, should be made available to the respondents for testing the genuineness of the said evidence and or report, if the person, occupier or possessor of the premises or place seeks such an opportunity. Under Section 135 (1), it is open to the State Government to authorise any officer to enter, inspect, break open and search any place or premises where electricity has been or is being used unauthorizedly, and or search and seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being used unauthorised. As it is therefore, open to persons other than those notified under Section 126 to carry out an inspection in terms of Section 135(2). Courts while considering

the provisions of the Act must take into consideration the object of the enactment. Considering the large number of consumers the company serves and the need for the generating companies to recover from persons who make unauthorised use of electricity, their legal dues. It will, therefore, be possible to read Section 126 to mean that the assessing officer need not restrict himself to the inspection carried out personally by the Assessing Officer as notified in the explanation to section 126, but can rely on the record and inspection carried out by an Officer authorised under section 135(2) of the Act in the discharge of his duties. The only limitation as set out by us earlier would be that in such a case, the report prepared by such other authorised officer will have to be made available to the consumer and its evidentiary value will have to be proved by the generating company by allowing such other authorised officer to be examined by the assessee if the assessment applies. In these circumstances, in our opinion, to give effect to the object of the Act, it is possible to read into Section 126(1) that apart from the Assessing Officer, the inspection carried out by an Officer authorised by the State Government under Section 135(2) can also be the basis for making a provisional assessment under Section 126(i) of the Act.

8. Having answered the issue of law, in our opinion, considering the contentions on merits, raised by the Petitioner herein, the impugned order is set aside and the matter is remanded to the Assessing Officer, to start the process afresh, from the point of service of the provisional assessment already made. The Respondent No. 2 within twelve weeks from today, would be entitled to file his reply before the Assessing Officer and the Assessing Officer will thereafter pass appropriate orders according to Law.

9. In the light of the above, we pass the following order :

(i) The impugned order of the Appellate Authority and Assessing Officer is set aside.

(ii) The matter is remanded back to the Assessing Officer for reconsideration. It will be open to the Respondents to file their reply before the Assessing Officer. The Assessing Officer thereafter to proceed according to law and pass appropriate orders.

(iii) Rule made partly absolute accordingly.

(MRS.V.K.TAHILRAMANI, J.)

(F.I.REBELLO, J.)